Supreme Court, U.S.
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In The

Supreme Court of the United States

ALICE COX,

Petitioner,

versus

DESOTO COUNTY, MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If a state unemployment agency finds that a county employee was discharged because of misconduct, is that employee collaterally estopped from bringing a 42 U.S.C. § 1983 unconstitutional discharge action against the county?

2. If the defendant in a 42 U.S.C. § 1983 action contends a state administrative decision collaterally estops an employee's claims against it, can the plaintiff employee attack the reliability of that administrative decision in federal court even if he or she did not first appeal the administrative decision to the state court?

3. May a grant of summary judgment be affirmed on appeal on the grounds that the non-movant failed to raise the correct legal argument in the district court even though that correct argument, demonstrating judgment as a matter of law was inappropriate, was raised on appeal?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Alice Cox, Petitioner;
2. Jim Waide, Counsel for Petitioner;
3. DeSoto County, Mississippi, Respondent;
4. David A. Barfield, Esq., Counsel for Respondent;
5. Steven Lloyd Lacey, Esq., Counsel for Respondent;
6. Peter W. Cleveland, Esq., Counsel for Respondent; and
7. Anthony E. Nowak, Esq., Counsel for Respondent.

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The opinion of the United States Court of Appeals for the Fifth Circuit is attached as Appendix 1. It is reported at ___ F.3d ___ (5th Cir. 2009), 2009 WL 877651. The unreported opinion of the District Court granting summary judgment is attached as Appendix 2. The United States Court of Appeals' order denying rehearing is attached as Appendix 3.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit decided on April 3, 2009, petition for rehearing denied on May 4, 2009, by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statute involved is 42 U.S.C. § 1983, which says:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

> action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The rule of civil procedure involved is Federal Rule of Civil Procedure 56(c), which states, in pertinent part:

> The [summary] judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

STATEMENT OF THE CASE

After having filed a complaint in the United States District Court alleging a retaliatory job transfer because of age discrimination and because of her failure to campaign for the sheriff, Petitioner Alice Cox was working as a jailer at the DeSoto County Jail when she reported that deputies had assaulted a defenseless inmate. Suppl. R. 13-14. Six weeks later, Petitioner Cox was fired. Suppl. R. 16-17.

Petitioner then filed a second complaint charging that her firing was (1) in retaliation for her having filed suit under the Age Discrimination in Employment Act (ADEA) and (2) in violation of her First Amendment rights since her firing was the result of her truthfully reporting the beating of the inmate. Suppl. R. 10-22.

Respondent DeSoto County, Mississippi[1] moved for summary judgment alleging that Petitioner's claims were barred by collateral estoppel since a referee of the Mississippi Employment Security Commission (now the Mississippi Department of Employment Security ("MDES")), had denied Petitioner's request for unemployment benefits on the grounds that Petitioner had been fired for "misconduct." Suppl. R. 88-116. Through testimony of county deputies, the Respondent had convinced the MDES referee that Petitioner's claim regarding the inmate's assault was false. Suppl. R. 97-98.

In arguing collateral estoppel did not apply, Petitioner presented evidence[2] showing that she did not receive a fair hearing before the MDES because

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[1] The other Respondents in the case are all persons who caused or participated in DeSoto County, Mississippi's firing Petitioner.

[2] Through discovery, Petitioner had obtained a transcript of the inmate's statement in which he clearly accused the deputies of assaulting him and, thus, demonstrated that the deputies had lied at the unemployment hearing in making their claims of misconduct.

the deputies perjured themselves by telling the unemployment referee that the allegedly-assaulted inmate's statement to deputies contradicted Petitioner's claims. Suppl. R. 279-88.

The district court granted summary judgment for Respondent, finding that both the ADEA anti-retaliation claim and the 42 U.S.C. § 1983 First Amendment claim were barred by the collateral estoppel effect of the state referee's determination that Petitioner was guilty of "misconduct" in connection with her work.[3] *Cox v. DeSoto County, Miss.*, 2007 WL 1322023, *3 (N.D. Miss. 2007); R., p. 1193; Appendix 2.

On appeal, the United States Court of Appeals for the Fifth Circuit reversed in part, and affirmed in part. Interpreting *Univ. of Tennessee v. Elliott*, 478 U.S. 799 (1986), the Fifth Circuit found that Petitioner's 42 U.S.C. § 1983 claim was barred by collateral estoppel. Regarding Petitioner's claim that she did not have a full and fair hearing before the MDES because of the deputies' perjury, the Fifth Circuit ruled that Petitioner could not make this claim since

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[3] The district court misread the record when it stated that Petitioner conceded the collateral estoppel issue. The correct reading of the record indicates that Petitioner conceded only that the authorities from the Fifth Circuit and the Mississippi Court of Appeals, *Stafford v. True Temper Sports*, 123 F.3d 291 (5th Cir. 1997) and *Railoa v. Chevron U.S.A., Inc.*, 872 So.2d 79 (Miss. App. 2004), were not in her favor. In the district court below and in the Fifth Circuit Court of Appeals, Petitioner vigorously contested the collateral estoppel issue. *See* Suppl. R. 279-88.

she had not appealed the unemployment decision to the state courts. *Cox v. DeSoto County, Miss.*, 2009 WL 877651 *2 (5th Cir. 2009); Appendix 1.

However, the Fifth Circuit found that collateral estoppel did not bar Petitioner's ADEA retaliation claim, relying upon *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991); *Cox v. DeSoto County, Miss.*, 2009 WL 877651 *3. The Respondent's petition for rehearing on the ADEA retaliation claim was denied on May 4, 2009. Appendix 3.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT IN THE CIRCUITS AS TO WHETHER A STATE UNEMPLOYMENT HEARING TRIBUNAL'S FINDING OF MISCONDUCT COLLATERALLY ESTOPS A DISCHARGED EMPLOYEE FROM PURSUING A 42 U.S.C. § 1983 ACTION.

The Fifth Circuit's giving collateral estoppel effect to the decision of the state agency denying unemployment benefits is an overly broad interpretation of *Univ. of Tennessee v. Elliott*, 478 U.S. 788 (1986). *Elliott* held only that a state administrative tribunal's determination that there was no race discrimination against plaintiff barred a subsequent plaintiff's Section 1983 suit also alleging race discrimination. *Elliott* did not decide whether a finding of misconduct by a state unemployment agency, where findings are geared toward speed, not accuracy, would bar a 42

U.S.C. § 1983 suit on the different issue of whether a plaintiff's exercise of protected speech was a cause of his termination.

Other circuits have rejected the Fifth Circuit's interpretation of *Elliott*, and have held that state unemployment hearings are too different from 42 U.S.C. § 1983 actions to have collateral estoppel effect. *See, e.g., Dionne v. Mayor and City Council of Baltimore*, 40 F.3d 677, 682 (4th Cir. 1994) ("the unreviewed state administrative agency decision at issue here does not have claim preclusive effect in a subsequent § 1983 suit even though the later suit arises out of the same transaction or series of transactions"); *Gjellum v. City of Birmingham, Ala.*, 829 F.2d 1056, 1065 (11th Cir. 1987) ("in the context of section 1983 suits, the federal common law of preclusion does not require application of state claim preclusion rules to unreviewed state administrative decisions"). *See also, Delgado v. Lockheed-Georgia Co., Div. of Lockheed Corp.*, 815 F.2d 641, 647 (11th Cir. 1987) (granting collateral estoppel effect to unemployment decisions would cause "employers to litigate unemployment compensation claims as discrimination suits" and would "work a hardship, not only on the parties, but on other unemployed persons awaiting determination of their claims"); *Hill v. Coca-Cola Bottling Co. of New York*, 786 F.2d 550, 554 (2nd Cir. 1986) ("It would be unfair to penalize Hill, through the doctrines of res judicata and collateral estoppel, for employing authorized state procedures, particularly when the litigated issue in the unemployment insurance

proceeding barely touched on the discrimination claim"); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1284 (9th Cir. 1986) (collateral estoppel effect would not be given unemployment tribunal's determination since "employee with a federal discrimination claim might have to decide to forego state unemployment benefits rather than risk an adverse ruling that could have preclusive effect on a federal discrimination claim that he may not be adequately prepared to litigate before the Board").

The conflict in the circuits as to whether a decision of a state unemployment agency is to be given collateral estoppel effect in a 42 U.S.C. § 1983 action warrants the granting of the Writ.

II. THE FIFTH CIRCUIT'S BARRING A 42 U.S.C. § 1983 ACTION ON GROUNDS PETITIONER SHOULD HAVE APPEALED AN UNFAVORABLE ADMINISTRATIVE DECISION TO THE STATE COURTS CONFLICTS WITH THIS COURT'S PRECEDENTS.

Besides the fact that the Fifth Circuit's overly-broad interpretation of *Elliott* conflicts with other circuits, this Court should also grant review because of the Fifth Circuit's failure to apply the Court's precedent stating that "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness of fairness of the procedures involved in the prior litigation." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 481 (1982). *Allen v. McCurry*, 449

U.S. 90, 95 (1980) ("the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case"), quoting *Montana v. United States*, 440 U.S. 147, 153 (1979).

The Fifth Circuit Court of Appeals refused to consider whether the earlier employment referee's decision was tainted by the deputies lying about the content of the inmate's statement on the grounds that the Petitioner should have appealed the referee's decision through the state courts. *Cox v. DeSoto County, Miss.*, 2009 WL 877651 *2 (5th Cir. 2009); Appendix 1. This holding is inconsistent with *Kremer v. Chemical Const. Corp.*, 456 U.S. at 469, which noted that "[n]o provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action, . . . ". As is true of Title VII, there is also no provision in 42 U.S.C. § 1983 which requires a plaintiff to pursue an appeal of a state administrative decision in a state court before he may resort to federal court to protect constitutional rights.

Patsy v. Board of Regents of State of Fla., 457 U.S. 496, 516 (1982), held that courts may not engraft a requirement of exhaustion of state administrative remedies over the plain language of 42 U.S.C. § 1983 which contains no exhaustion requirement. Similarly, the Fifth Circuit should not engraft a requirement of state legal remedies over the plain language of 42 U.S.C. § 1983, which contains no such requirement. Indeed, 42 U.S.C. § 1983, was enacted because of the

"grave congressional concern that state courts had been deficient in protecting federal rights." *Allen v. McCurry*, 449 U.S. at 95. According to *Monroe v. Pape*, 367 U.S. 167, 183 (1961), "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."

Because the Fifth Circuit's requirement that a 42 U.S.C. § 1983 plaintiff exhaust state legal remedies is inconsistent with this Court's precedents, the Writ should be granted.

III. THERE IS A CONFLICT IN THE CIRCUITS AS TO WHETHER THE GRANT OF SUMMARY JUDGMENT CAN BE AFFIRMED ON APPEAL ON THE GROUND THAT THE NON-MOVANT DID NOT RAISE THE CORRECT LEGAL ARGUMENT FOR DENYING SUMMARY JUDGMENT TO THE DISTRICT COURT.

Petitioner argued in her reply brief on appeal to the Fifth Circuit that even if she were collaterally estopped to deny "misconduct" in connection with her work, a jury could find that the exercise of her First Amendment rights was another contributing cause of Petitioner's termination. *See Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 286-87 (1977) (plaintiff may proceed in 42 U.S.C. § 1983 action by showing violation of constitutional right was one substantial cause of the injury). The Fifth Circuit refused to consider this mixed-motive argument

because it was not made to the district court. Appendix 1, p. 3.

However, the Seventh Circuit has held that a failure to assert the correct legal argument to the district court "does not constitute a waiver by the nonmoving party of all legal arguments based upon those undisputed facts." *Flynn v. Sandahl*, 58 F.3d 283, 288 (7th Cir. 1985), *citing Johnson v. Gudmundsson*, 35 F.3d 1104, 1112 (7th Cir. 1994).

The Fifth Circuit's contrary rule that the "scope of appellate review on a summary judgment is limited to matters presented to the district court," *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 339 (5th Cir. 2005), conflicts with the language of Federal Rule of Civil Procedure 56(c), which permits summary judgment only if a party is entitled to it as a "matter of law." If, by reason of a mixed-motive, Respondent was not entitled to judgment as a matter of law, the failure to make the appropriate legal argument to the district court still does not entitle movant to "judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Fifth Circuit's rule that a failure to make the appropriate legal argument results in summary judgment, not otherwise proper, is inconsistent with cases which hold that a movant cannot be granted summary judgment on the grounds non-movant made no response at all to the motion for summary judgment. *See, e.g., Mendez v. Banco Popular de Puerto Rico*, 900 F.2d 4, 7 (1st Cir. 1990) (mere fact that plaintiff failed to file a timely opposition to defendant's motion

for summary judgment did not require court to grant defendant's motion); *Champion v. Artuz,* 76 F.3d 483, 486 (2nd Cir. 1996) (fact that there has been no response to summary judgment motion does not mean that motion is to be granted automatically); *U.S. v. One Piece of Real Property Located at 5800 SW 74th Ave., Miami, Fla.,* 363 F.3d 1099, 1101 (11th Cir. 2004) (district court cannot base entry of summary judgment on mere fact that motion is unopposed). If summary judgment may not be affirmed for failure to make any response to the district court at all, it is illogical to affirm the grant of the motion because the correct response was not made to the district court.

The Fifth Circuit's affirming summary judgment on the grounds that Petitioner did not make the correct legal argument before the district court conflicts with Fed. R. Civ. P. 56(c), which states summary judgment is to be granted only if a party is entitled to it "as a matter of law." Because of the conflict with the Third Circuit and the conflict with the wording of Rule 56(c), the Writ should be granted.

CONCLUSION

The Fifth Circuit's decision conflicts with other circuits, misinterprets precedents of this Court and ignores the language of Federal Rule of Civil Procedure 56(c).

Respectfully submitted,

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2009 WL 877651

United States Court of Appeals,
Fifth Circuit.
Alice Faye **COX**, Plaintiff-Appellant,
v.
DESOTO COUNTY, MISSISSIPPI,
Defendant-Appellee.
No. 08-60004.

April 3, 2009.

Jim D. Waide, III (argued), Luther Calvin Fisher, IV, Tupelo, MS, for Cox.

Steven Lloyd Lacey, (argued), David Alan Barfield, Barfield & Associates, Madison, MS, Peter Watkins Cleveland, Jackson, MS, Anthony E. Nowak, Smith, Phillips, Mitchell, Scott & Nowak, Hernando, MS, for DeSoto Cty., MS.

Appeal from the United States District Court for the Northern District of Mississippi.

Before SMITH, OWEN and HAYNES, Circuit Judges.

HAYNES, Circuit Judge:

Alice Cox appeals the decision of the district court granting summary judgment against her claims based upon the defense of collateral estoppel emanating from a ruling in an administrative proceeding. For the reasons set forth below, we REVERSE the judgment as to her ADEA retaliation claims and REMAND those claims; we AFFIRM the remainder of the district court's judgment.

I.

Factual Background

Cox was a secretary in the sheriff's office of DeSoto County. She alleges that, as a result of her age and her refusal to campaign actively for the sheriff's re-election, she was transferred from her secretarial position to a position in the jail for which she was not trained or qualified. In November of 2003, she filed suit on these claims; she continued to be employed at the jail. In October of 2004, while her first suit was pending, she made a report to her jail supervisor to the effect that she had witnessed abuse of a jailed inmate by several officers.

Following an investigation by the DeSoto County District Attorney's office, it was found that no misconduct occurred and that Cox gave inconsistent statements about the events she allegedly witnessed. Cox was terminated for giving a false report. She amended her complaint in the wrongful transfer lawsuit, contending that DeSoto County terminated her in retaliation for filing the wrongful transfer lawsuit and that the reason given for her firing was pretextual. She later sued several individual defendants, such as the sheriff and the district attorney; that suit was consolidated with the original DeSoto County suit.

Cox filed for unemployment benefits. The Mississippi Employment Security Commission (MESC) conducted a hearing and determined that Cox was not eligible for benefits because she was discharged for

work-related misconduct. She unsuccessfully appealed to an Appeals Referee and Board of Review. She then filed an appeal in the local circuit court, which she ultimately dismissed.

After the dismissal of her administrative case, the defendants in the wrongful transfer/termination case filed a motion for summary judgment contending that the collateral estoppel effect of the MESC ruling barred her case in federal district court. The court granted the summary judgment as to the termination claims, but it conducted a jury trial on the original transfer claims. The jury found for Cox on the age claim and for the County on the First Amendment claim (relating to the sheriff's re-election campaign issue). The district court entered judgment on the jury verdict and the previously-granted summary judgment.

On appeal, no one challenges the judgment on the jury verdict, so we do not consider the original wrongful transfer claims. The other claims are based upon the contention that Cox was fired for filing the original wrongful transfer lawsuit, a suit predicated partially on age discrimination, and the contention that the county's proffered reasons for Cox's discharge were false and pretextual.[1]

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[1] Although couched as violations of constitutional rights and interference with employment, her claims against the individual defendants are based upon the same contention – that they caused her to lose her job because of the wrongful transfer

(Continued on following page)

II.

Standard of Review

Because the appeal concerns only the portion of the judgment that was based upon the court's original summary judgment, our review is de novo.[2] *Adams v. Travelers Indem. Co.,* 465 F.3d 156, 163 (5th Cir.2006).

III.

Discussion

A. Should this Court Give Collateral Estoppel Effect to the MESC's Findings?

The law is clear that "when a state agency acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact-finding the same preclusive effect to which it would be entitled in the State's courts." *Univ. of Tenn. v. Elliott,* 478 U.S. 788, 799, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) (internal quotation marks, alteration, and citation omitted). In Mississippi, administrative decisions are given preclusive effect. *Smith v. University of Mississippi,* 797

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suit and that their handling of the investigation was biased and improper.

[2] Defendants contend that Cox failed to appeal properly this case as against the individual defendants. While it is not a model notice of appeal, we conclude that Cox adequately filed her appeal against all defendants.

So.2d 956, 963 (Miss.2001). Specifically, the decisions of the MESC are given preclusive weight in Mississippi courts, if supported by the evidence and in the absence of fraud. MISS.CODE ANN. § 71-5-531 (Rev.2000); *Raiola v. Chevron U.S.A., Inc.,* 872 So.2d 79, 84 (Miss.Ct.App.2004).

Although Cox voluntarily dismissed her judicial appeal of the MESC ruling, she now seeks to attack that ruling collaterally by contending that a non-judicially reviewed decision of the MESC should not be granted preclusive effect. She also contends that the ruling was not based upon substantial evidence and was tainted with fraud. Cox's failure to fully pursue an appeal under § 71-5-531 does not undermine the preclusive effect of the MESC's decision. *See Raiola,* 872 So.2d at 84 (forbidding collateral attack of MESC decision where claimant sought and received voluntary dismissal of appeal under § 71-5-531). If there were no opportunity for judicial review, we would have a potentially different situation. Here, however, it is Cox who failed to pursue her appropriate avenues to challenge the judgment. Had she done so, she would have had the opportunity to present evidence, if any, that the MESC's decision was tainted by fraud or based on a lack of substantial evidence. *See NCI Bldg. Components v. Berry,* 811 So.2d 321, 329 (Miss.Ct.App.2001) (noting that a court lacks the power to overturn the findings of the MESC unless evidence is presented that the findings are "riddled with fraud" or based on a lack of substantial evidence). Because Cox failed to fully avail

herself of this avenue, she cannot now collaterally attack the MESC's decision.

B. Does Collateral Estoppel Bar Cox's Claims?

The parties concede, under Supreme Court authority, that collateral estoppel does not apply to state administrative decisions where Congress has provided for a detailed administrative remedy such as that found in the Age Discrimination in Employment Act (ADEA). *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 110-14, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991). The ADEA has an anti-retaliation section which was arguably implicated by Cox's complaint that she was discharged in retaliation for filing her original complaint under the ADEA. *See* 29 U.S.C. § 623(d). Defendants contend that Cox failed to raise this issue in the district court, but we note that she did raise it, albeit not in great detail.[3] Thus, we conclude that Cox's claims based upon the ADEA anti-retaliation provisions are not barred by collateral estoppel.

Cox's remaining claims that were not addressed by the jury verdict center on the alleged wrongfulness

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[3] In the district court, Cox stated: "Also to the extent Plaintiff's claims are based on the anti-retaliation provisions of the ADEA, collateral estoppel does not bar these claims, because state administrative provisions which are not judicially reviewed do not have preclusive effects on claims made pursuant to a detailed administrative scheme to regulate employment discrimination."

of her discharge. Other than the ADEA retaliation claim, they are barred by the preclusive effect of the MESC finding regarding the reason for her discharge. In her reply brief, Cox claims that the MESC finding, even if true, would not prevent her claims because her discharge could have been caused by a mixed motive – her misconduct and a protected reason. At oral argument and by subsequent letter to the court, her attorney conceded that he could not point to any place where a mixed-motive claim was raised in the district court.[4] *See Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 344 n. 3 (5th Cir.2007) ("It is well settled that we do not consider issues raised for the first time on appeal."). Additionally, we customarily

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[4] In a post-argument letter, Cox's counsel contends that this court should consider the mixed-motive issue despite the absence of any raising of this issue before the district court, citing to certain Seventh Circuit cases. *See Flynn v. Sandahl*, 58 F.3d 283 (7th Cir.1995); *Johnson v. Gudmundsson*, 35 F.3d 1104 (7th Cir.1994); *Glass v. Dachel*, 2 F.3d 733 (7th Cir.1993). However, he concedes that Fifth Circuit precedent, by which we are bound, is to the contrary. *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 339 (5th Cir.2005) ("It is well settled in this Circuit that the scope of appellate review on a summary judgment order is limited to matters presented to the district court."). Our cases are clear that mixed-motive must be raised in the trial court by the party seeking to rely upon it on appeal. *See Nasti v. CIBA Specialty Chem.*, 492 F.3d 589, 595 (5th Cir.2007) (finding waiver of mixed-motive claim because no concession of legitimate, non-discriminatory reason for discharge made before district court). Cox did not raise this issue anywhere before the district court – in her pleadings or in the summary judgment papers. Thus, we decline to address this issue for the first time at this late date.

do not consider an appeal point raised for the first time in a reply brief. *Carmona v. Southwest Airlines Co.*, 536 F.3d 344, 347 n. 5 (5th Cir.2008). Thus, we do not reach the question of whether a mixed-motive claim would survive the MESC finding in this case.

IV.

Conclusion

For the foregoing reasons, summary judgment on Cox's claims based upon retaliation in violation of the ADEA anti-retaliation provisions is REVERSED and those claims are REMANDED to the district court for proceedings consistent with this opinion. In all other respects, the district court's judgment is

AFFIRMED.

2007 WL 1322023

United States District Court,
N.D. Mississippi,
Eastern Division.
Alice Faye COX, Plaintiff
v.
DESOTO COUNTY SHERIFF'S DEPARTMENT
and Desoto County, Mississippi, Defendants.
Alice Faye Cox, Plaintiff
v.
James Riley, individually and in his official capacity
as Sheriff of DeSoto County, Mississippi,
John Champion, individually, Charles Brown,
and James Dunn, individually and in their official
capacities as deputy sheriffs and jail administrators
of DeSoto County, Mississippi, Defendants.
Nos. 1:03CV628, 1:05CV323.

May 1, 2007.

Jim D. Waide, III, Luther C. Fisher, IV, Waide & Associates, PA, Tupelo, MS, for Plaintiff.

Anthony E. Nowak, Smith, Phillips, Mitchell, Scott & Nowak, Hernando, MS, David A. Barfield, Steven Lloyd Lacey, Barfield & Associates, Peter W. Cleveland, Mississippi Attorney General's Office, Jackson, MS, Megan Carlisle Willoughby, Smith, Phillips, Mitchell, Scott & Nowak, Hernando, MS, for Defendants.

MEMORANDUM OPINION

MICHAEL P. MILLS, United States District Judge.

This cause comes before the court on the defendant DeSoto County's motion [117] for summary judgment on the plaintiff's termination claim. Plaintiff Cox has filed a motion in response. The court has reviewed the briefs and submissions and is prepared to rule.

This cause of action was filed on November 12, 2003. The plaintiff alleged that she suffered an undesirable transfer as a result of her failure to support the sheriff in his campaign for reelection. On December 29, 2004, Cox filed an amended complaint to add an additional claim of retaliation since she had been terminated on December 7, 2004, for allegedly giving a false statement in relation to an incident of abuse of a prisoner. A trial date was set for November 14, 2005; however, on November 10, 2005, the plaintiff moved to add a claim that her termination was caused by a violation of her First Amendment rights. The motion was granted and the trial date was continued so as not to prejudice the defendants. On November 16, 2005, Cox filed a motion to dismiss her appeal of the Mississippi Department of Employment Security decision related to her termination that was pending in DeSoto County Circuit Court. The DeSoto County Circuit Court dismissed the appeal on December 5, 2005, and on December 7, 2005, the plaintiff filed a suit against individual defendants Riley,

Champion, Dunn, and Brown (1:05cv323). The suit against the individual defendants was consolidated with the instant action on November 16, 2006.

The defendant now moves for summary judgment on two grounds. First, the defendant contends that collateral estoppel and/or res judicata bars her termination claim. Second, the defendant contends that the First Amendment does not protect the speech that led to her termination because she was speaking pursuant to her employment duties.

ANALYSIS

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). An issue of material fact is genuine if a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In reviewing the evidence, this Court must draw all reasonable inferences in favor of the nonmoving party, and avoid credibility determinations and weighing of the evidence. *Reeves v. Sanderson Plumbing Prods. Inc.,* 530 U.S. 133, 150, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000). In so doing, the Court must disregard all evidence favorable to the moving party

that the jury is not required to believe. *Reeves,* 530 U.S. at 151, 120 S.Ct. at 2110.

Plaintiff Cox filed an initial claim for benefits with the Mississippi Department of Employment Security, which was denied on December 29, 2004. The plaintiff was disqualified for benefits based on the ground that she was discharged for misconduct connected with work. She filed a notice of appeal to the Appeals Referee on January 4, 2005, and the hearing was held on January 24, 2005. The decision was affirmed on January 28, 2005. The plaintiff then filed a notice of appeal to the Board of Review, which affirmed the decision on March 3, 2005. Plaintiff Cox then filed an appeal in the DeSoto County Circuit Court, which she voluntarily dismissed December 5, 2005.

DeSoto County maintains that the plaintiff's termination claims are issue precluded. The Fifth Circuit has clearly recognized that federal courts must give an agency's fact finding the same preclusive effect that they would a decision of a state court, when the state agency is acting in a judicial capacity and gives the parties a fair opportunity to litigate. *Stafford v. True Temper Sports,* 123 F.3d 291, 294 (5th Cir.1997). The defendant has conceded that this court must accept that the Mississippi Employment Security Commission's administrative decision estops the plaintiff's termination claim. Accordingly, this court does not reach the question of First Amendment protection and the defendant's motion [117] for summary

judgment on Cox's termination claim is GRANTED on the basis of res judicata.

Mississippi Tort Claims Act

This court administratively dismissed motion 17, the defendants' motion to dismiss, in member case *Cox v. Riley* (1:05cv323) due to the duplication of the res judicata claim made in the lead case. The court now takes up other issues raised in motion 17.

> In considering a motion to dismiss, the complaint should be construed in favor of the plaintiff, and all facts pleaded should be taken as true. Motions "to dismiss for failure to state a claim [are] 'viewed with disfavor, and [are] rarely granted.'" A Rule 12(b)(6) dismissal will not be affirmed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

S. Christian Leadership Conference v. Supreme Ct. of La., 252 F.3d 781, 786 (5th Cir.2001) (citations omitted).

Defendants Riley, Brown, and Dunn contend that the plaintiff's state law claims are barred because Plaintiff Cox did not comply with the notice provisions of the Mississippi Tort Claims Act. The Mississippi Tort Claims Act requires that a person file a written notice of a claim in person or by registered or certified mail with the chief executive officer of a government entity before proceeding with a civil action.

See Miss.Code Ann. 11-46-11(1). The notice must be given at least ninety days prior to commencing action.

The plaintiff asserts that her state law claim for malicious interference with employment is not barred by the Mississippi Tort Claims Act. Any state claim for which the plaintiff did not provide adequate notice must be dismissed; however, claims based on allegations of "malice" fall outside the scope of the MTCA. Specifically, Miss.Code. Ann. § 11-46-7(2) provides as follows:

> (2) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties. For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, *malice,* libel, slander, defamation or any criminal offense.

As this issue is raised by Riley, Brown, and Dunn, this court will only address allegations of malice directed at these parties. The allegations in the plaintiff's complaint only assert malicious interference with employment contract by Defendant Dunn The plaintiff's allegations accuse Dunn of intentionally

withholding information in order to cause Cox to lose her job. At this stage, the plaintiff's allegations must be accepted as true, which would ordinarily require that Cox's claim of malicious interference with employment contract survive the motion to dismiss. However, as summary judgment has been granted on the basis of res judicata with respect to the plaintiff's termination claims, Cox's claim for malicious interference with employment contract must fail.

Official Capacity Claims

The defendants also assert that allegations against Riley, Dunn, and Brown in their official capacities are essentially the same allegations made against DeSoto County in the *Cox v. DeSoto County,* and that any official capacity claims be dismissed to avoid duplicate litigation. This point has been rendered moot due to the consolidation of the cases on November 16, 2006.

Individual Capacity Claims

The plaintiff has raised individual capacity claims unrelated to her termination against defendants Riley and Brown. She alleges that they caused her to be transferred from her secretarial position to a job in the medroom due to her failure to actively campaign for Sheriff Riley's reelection. Individual capacity suits impose individual liability upon a government officer for actions taken under color of state law; therefore, a plaintiff must show that an official

acting under color of state law caused the deprivation of a federal right. *Hafer v. Melo,* 502 U.S. 21, 25, 112 S.Ct. 358, 362, 116 L.Ed. 301 (1991). Officials sued in their individual capacities may assert the personal immunity defense that he or she acted in objectively reasonable reliance on existing law. *Id.* Reasonableness is assessed in light of the legal rules that were "clearly established" at the time action was taken. *Thompson v. City of Starkville, Mississippi,* 301 F.2d 456, 468-69 (5th Cir.1990).

The defendants only address the plaintiff's termination claims in their argument, but Cox's claims related to her transfer clearly allege a violation of her First Amendment rights. A public employer cannot act against an employee because of the employee's affiliation or support of a rival candidate unless the employee's activities in some way adversely affect the government's ability to provide services. *Brady v. Fort Bend County,* 58 F.3d 173, 175 (5th Cir.1995). Assuming her allegations are true, Riley and Brown violated Cox's clearly established First Amendment rights. According to Cox, her transfer occurred due to her refusal to campaign for the sheriff. The defendants did not address this issue in their motion; therefore, there were no assertions that her lack of support for Riley interfered with her secretarial duties or the functioning of the DeSoto County Sheriff's Department in general. A reasonable official would understand that an employee has the right to support or not support any candidate of his or her choosing. Accordingly, Riley and Brown are not entitled to

qualified immunity with regard to the plaintiff's retaliatory transfer claim.

Defendant John Champion

The court also administratively dismissed Defendant John Champion's motion [24] to dismiss until resolution of the res judicata issue relating to Plaintiff Cox's termination claim. All claims against Champion relate to the plaintiff's termination. As summary judgment has been granted with respect to the plaintiff's termination claims, the motion is moot.

This court finds that:

1. Defendant DeSoto County's motion [117] for summary judgment on the termination claim is GRANTED;

2. State law claims against defendants Dunn, Riley, and Brown are DISMISSED (pursuant to motion 17 in member case);

3. Dunn, Riley and Brown's motion to dismiss the official capacity claims against them has been rendered MOOT due to case consolidation [17];

4. Riley and Brown's motion for qualified immunity is DENIED with respect to Cox's retaliatory transfer claims [17]; and

5. Defendant Champion's motion to dismiss is MOOT (pursuant to motion 24 in member case).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-60004

ALICE FAYE COX

Plaintiff-Appellant

v.

DESOTO COUNTY, MISSISSIPPI

Defendant-Appellee

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Appeal from the United States District Court
for the Northern District of Mississippi at Aberdeen

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ON PETITION FOR REHEARING

(Filed May 4, 2009)

Before SMITH, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is Denied.

ENTERED FOR THE COURT:

/s/ Catharina Haynes
United States Circuit Judge